APPENDIX

Oral Opinion of Judge Letts Granting Defendant's Motion to Dismiss

[R. 38a] (April 12, 1957)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1066-54

UNITED STATES OF AMERICA

v.

JOHN McSHAIN, INC., DEFENDANT

WASHINGTON, D. C., Friday, April 12, 1957.

The above-entitled action came on for further trial at 10:00 o'clock a. m., on Friday, April 12, 1957, in the United States District Court for the District of Columbia.

Before: Honorable F. Dickinson Letts, Judge.

Appearances: George F. Leonard, Esquire, and David U. Seaman, Esquire, Assistants to the Attorney General, on behalf of the United States; Charles B. Murray, Esquire, Nicholas J. Chase, Esquire, and George F. Shea, Esquire, on behalf of the defendant.

OPINION OF THE COURT

The COURT (Letts, J.). When the plaintiff closed its case and rested the defendant moved for a judgment in its favor.

The Court has considered the arguments and briefs submitted in support thereof and the arguments and briefs opposing such motion.

The Court is now prepared to rule.

My study and reflections have led me to the conclusion that the plaintiff has failed to make out a prima facie case.

My ruling will rest upon the record but perhaps I should specify my ultimate and controlling conclusion:

I find that plaintiff's contracting officer in fact initiated negotiation proceedings and that such was his avowed intention;

I find that the invitation was so understood by the defendant and that the defendant made his proposal in the spirit of such intended purpose;

[R. 39a] It seems clear that the contracting officer knew or certainly had reason to know that the defendant did not intend his proposal to be treated as a firm bind. Such contracting officer must have known that the defendant had a right to negotiate and that he was not surrendering that right in making his proposal upon the form presented to him by the contracting officer.

I further find that the transaction between plaintiff and defendant never got beyond the negotiating stage;

The proof which has been offered by plaintiff fails to show a binding and enforceable contract.

The defendant's motion for judgment is granted and a judgment for defendant will be entered of record.

(Thereupon the instant proceedings were concluded.)

Final Judgment

(April 16, 1957)

This case having come on for trial and the plaintiff having introduced its evidence and rested, and the defendant having moved for judgment, and the said motion and the opposition thereto having been fully argued by counsel for the parties in open court, and fully heard by the court, and the court having considered the briefs of the parties;

and the court having announced its opinion, findings of fact, and conclusions of law on April 12, 1957, it is by the court this 16th day of April 1957;

Adjudged, ordered and decreed that the motion of the defendant for judgment be, and it is hereby, granted; and that the cause be and it is hereby, dismissed with prejudice.

By the Court:

(S) F. DICKINSON LETTS,
Judge.

Presented by:

(S) Charles B. Murray
CHARLES B. MURRAY,
(S) George F. Shea,
GEORGE F. SHEA,
(S) Nicholas J. Chase,
NICHOLAS J. CHASE,
Attorneys for Defendant.

Opinion and Judgment

UNITED STATES COURT OF APPEALS.
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14084

UNITED STATES, APPELLANT

v.

JOHN McSHAIN, INC., APPELLEE

Appeal from the United States District Court
for the District of Columbia

Decided May 8, 1958

Mr. George S. Leonard, with whom *Assistant Attorney General Doub, Mr. Oliver Gasch*, United States Attorney,

and *Messrs. Paul A. Sweeney, Hershel Shanks* and *Samuel D. Slade,* Attorneys, Department of Justice, were on the brief, for appellant. *Mr. Lewis Carroll,* Assistant United States Attorney, also entered an appearance for appellant.

Mr. Charles B. Murray, with whom *Mr. George F. Shea* was on the brief, for appellee.

Before PRETTYMAN and WASHINGTON, Circuit Judges, and MADDEN, Judge, United States Court of Claims.*

MADDEN, *Judge:* This is an appeal from a judgment of the District Court for the District of Columbia, dismissing the plaintiff's suit for breach of contract, brought pursuant to 28 U. S. C. § 1345. The Government was the plaintiff. At the close of its case the defendant moved to dismiss the action on the ground that no contract had been proved. The motion was granted and a judgment of dismissal was entered.

The Government's evidence, which the District Court held insufficient to prove a contract, consisted of three documents. They were (1) a "Request for Proposals" for the construction of a building for the Government, copies of which document were sent to the defendant and several other contractors; (2) the submission to the Government by the defendant of a "Contractor's Proposal"; and (3) the issuance by the Government to the defendant of a "Notice of Award and Notice to Proceed."

The defendant refused to perform the alleged contract; the Government had the building built by another contractor at a price higher than the price named in the defendant's "Contractor's Proposal," and brought the instant suit to recover damages for the defendant's alleged breach of contract.

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* Sitting by designation pursuant to provisions of Sec. 291 (a), Title 28, U. S. Code.

The Armed Services Procurement Act of 1947, 62 Stat. 21, 41 U.S.C. § 151 *et seq.*, now recodified as 10 U.S.C. § 2301 *et seq.*, provides in section 151 (c) that under certain circumstances contracts "may be negotiated by the agency head without advertising." The circumstances of the contract in question were such that it could lawfully be negotiated without advertising.

The Government's "Request for Proposals," mentioned above, was a voluminous document containing general conditions, several hundred pages of specifications, and incorporations by reference of a large number of drawings. It set 3:00 p.m., 2 October 1951 as the date and hour before which sealed proposals would be received

> for the purpose of negotiating a construction contract for furnishing all plant, labor, materials and equipment and performing all work for the above-described project in strict accordance with the specifications, schedules, addenda and drawings as follows * * *.

It said that the proposer who was awarded the contract would be required to execute the Army Contract Form for construction contracts. It said:

> The right is reserved, as the interest of the Government may require, to reject any and all proposals and to negotiate with any proposer.

The Government's second document introduced in evidence was the defendant's "Proposal" dated October 2, 1951. It says

> In compliance with your Request for Proposals * * * the undersigned hereby proposes to furnish the plant, labor, materials and equipment and perform all work for the above-described project in strict accordance with the specifications, schedules, drawings and addenda
>
> * * * * *

> for the consideration of * * * $6,574,825. * * * and agrees, upon receipt of written notice of an award of the contract within thirty days after the date of opening of the proposal, that he will execute contract Form No. R-5701 in accordance with the proposal as accepted * * *.

The Government's third document was its "Notice of Award and Notice to Proceed," addressed to the defendant, and saying

> You are hereby notified that your proposal dated 2 October 1951, in the total amount of $6,574,825.00 * * * is accepted * * *.
>
> * * * * *
>
> This is your formal notice to proceed with the work under the contract. * * *

The defendant's answer admitted the allegation of the complaint that "Defendant did not * * * proceed with the work * * *."

We see, in the above-described documents introduced by the Government, a text-book example of a contract. There was an invitation to the defendant to make an offer, an offer, and its acceptance. The defendant says that the invitation was an invitation to it to submit something which would be the subject of a "negotiation." Negotiation is a process of submission and consideration of offers until an acceptable offer is made, and accepted, or until it becomes apparent that no acceptable offer will be made. The brevity or the length of the haggling does not remove it from the definition of negotiation. If the first offer is accepted, the negotiation is concluded and a contract is made, just as it would be if the fifth or the fiftieth offer had been the accepted one.

The defendant, when it submitted its proposal, could not possibly, unless because of some extraneous circum-

stance which eludes our imagination, have desired that the Government reject its proposal and begin negotiations. That could only have meant that the Government would try to beat down the price, or add to the required work, or somehow get a more favorable bargain for the Government.

The only question before the District Court was the question of the interpretation of written documents. That is a "question of law" as to which this court is not bound by the "clearly erroneous" provision of Rule 52 (a). *McWilliams Dredging Company v. United States*, 118 C. Cls. 1 (1950); *Dollar* v. *Land*, 87 U. S. App. D. C. 214, 184 F. 2d 245, 248-249 (D. C. Cir. 1950), *cert.* denied 340 U. S. 884, rehearing denied 340 U. S. 948. Our conclusion is that the ruling of the District Court on the defendant's motion to dismiss was erroneous. The Government having made a prima facie case, the defendant should have been put to its proof. The question whether that proof will refute the Government's claim is not, of course, before us, and we intimate no view concerning it.

The judgment of the District Court must be reversed and the case remanded.

Reversed and remanded.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14,084

UNITED STATES, *Appellant*,
v.
JOHN McSHAIN, INC., *Appellee*.

April Term, 1958.
C. A. 1066-54
United States Court of Appeals for the District of Columbia Circuit
FILED May 8 1958
JOSEPH W. STEWART
Clerk

Appeal from the United States District Court for the District of Columbia.

Before: Prettyman and Washington, Circuit Judges, and Madden, Judge, United States Court of Claims.

Judgment

This cause came on to be heard on the transcript of the record from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration whereof, It is ordered and adjudged by this Court that the judgment of the said District Court appealed from in this cause be, and the same is hereby, reversed, and that this cause be, and it is hereby, remanded to the District Court for a new trial.

Dated: May 8, 1958

PER JUDGE MADDEN.

STATUTES AND REGULATIONS
(Pertinent Portions)

Armed Services Procurement Act of 1947
Chapter 65—Public Law 413

(80th Congress, 2nd Session)

Act of February 19, 1948, c. 65, Sec. 2, 62 Stat. 21. 41 USCA 151, et seq.

This Act may be cited as the "Armed Services Procurement Act of 1947".

Sec. 2 * * *

(c) All purchases and contracts for supplies and services shall be made by advertising, as provided in section 3, except that such purchases and contracts may be negotiated by the agency head without advertising if

(1) determined to be necessary in the public interest during the period of a national emergency declared by the President or by the Congress; * * *

(17) * * *

Sec. 9. As used herein—

(a) The term "agency head" shall mean * * *

(b) The term "supplies" shall mean * * *

Sec. 10 * * *

Act of August 10, 1956, 70A Stat. 641, c. 1041, Sec. 53, 10 USC. Chapter 137, Secs. 2301, et seq.

Section 2301. Declaration of Policy.

2302—Definitions.

In this chapter—

(4) "Head of an agency" means * * *

(2) "Negotiate" means make without formal advertising.

(3) "Formal advertising" means advertising as prescribed by Section 2305(a) and (b) of this title. * * *

2304. Purchases and contracts: Formal advertising; Exceptions.

(a) Purchases of and contracts for property or services covered by this chapter shall be made by formal advertising. However, the head of an agency may negotiate such a purchase or contract if—

(1) it is determined that such action is necessary in the public interest during a national emergency declared by Congress or the President;

(2) * * *

(17) * * *

Act of June 10, 1921, c. 18, Title III, 42 Stat. 24; 31 U. S. C. A. 71 et seq. (Budget and Accounting Act of 1921, as Amended)

Sec. 71. *Public accounts to be settled in General Accounting Office.*

All claims and demands whatever by the Government of the United States or against it, and all accounts whatever in which the Government of the United States is concerned, either as debtor or creditor, shall be settled and adjusted in the General Accounting Office.

* * * * * * *

Sec. 74. *Certified balances of public accounts; conclusiveness; suspension of items; preservation of adjusted accounts; decision upon questions involving payments.*

Balances certified by the General Accounting Office, upon the settlement of public accounts, shall be final and conclusive upon the Executive Branch of the Government, * * *

* * * * * * *

Disbursing officers, or the head of any executive department, * * * may apply for and the Comptroller General

shall render his decision upon any question involving a payment to be made by them or under them, which decision, when rendered, shall govern the General Accounting Office in passing upon the account containing said disbursement. July 31, 1894, c. 174, Sec. 8, 28 Stat. 207; June 10, 1921, c. 18, Title III, Sec. 304, 42 Stat. 24; Oct. 25, 1951, c. 562, Sec. 3(1), 65 Stat. 639.

Orders and Regulations (O&R), Engineers Corps, Department of the Army, Part I, Chapter VII

7102.01 *Basic Policy.* Procurement will generally be effected by advertising for bids and thereafter awarding the contract to the lowest responsible bidder whose bid, conforming to the invitation for bids, will be most advantageous to the Government, price and other factors considered. However procurement will be effected by negotiation when authorized by and conducted in accordance with the detailed requirements and procedures set forth in paragraph 7102.02b. Bids will be solicited from all such qualified sources of supplies or services as are deemed necessary by the contracting officer to assure such full and free competition as is consistent with the procurement of the required supplies or services. Current lists of bidders will be maintained by each field installation and activity performing procurement or construction activities. No award of contract either pursuant to advertising or as a result of negotiation will be made where the total contract price is more than 50% in excess of the Government estimate of cost (see paragraph 4106.05c and 7103.03).

7102.02 *Methods of Contracting.*

a. *By advertisement* * * *

b. *By Negotiation.*

(1) *Definition.* The procurement of supplies or services in the open market in a manner common among businessmen without securing formal competition. However under

such circumstances the very absence of formal competition will require the solicitation of quotations oral or written regarding price, quality and other factors.

Armed Services Procurement Regulations (ASPR) 3-101, CFR. Title 32, Chapter IV, Sec. 402.101

Negotiations as Distinguished from Formal Advertising. As used throughout this regulation, negotiation means that method of procurement under which the procedures for procurement by formal advertising, as set forth in Part 401 of this Subchapter are not required. Whenever supplies or services are to be procured by negotiation, price quotations, supported by statements and analyses of estimated costs or other evidence of reasonable prices and other vital matters deemed necessary by the Contracting Officer, shall be solicited from all such qualified sources of supplies or services as are deemed necessary by the Contracting Officer to assure full and free competition consistent with the procurement of the required supplies or services, in accordance with the basic policies set forth in Subpart C of Part 400 of this Subchapter, to the end that the procurement will be made to the best advantage of the Government, price and other factors considered. Negotiations shall thereupon be conducted, by Contracting Officers and their negotiators, with due attention being given to the following and any other appropriate factors:

* * * * * * * *

(g) Individual bargaining, by mail or by conference;

* * * * * * * *

Army Procurement Procedure (APP) 3-101; CFR. Title 32, Chapter V, Sec. 592.101, 16 F.R. 4019

Negotiation as Distinguished From Formal Advertising

(a) *Competition.* The fact that a procurement is to be negotiated does not relax the requirements of competition. When supplies or services are to be procured by negotia-

tion and when consistent with the accomplishment of procurement objectives, quotations or proposals will be solicited from all such qualified sources of supplies (as defined in Secs. 400.201-9 and 590.201-9 of this title) or services as are deemed necessary to insure effective competition in order that the procurement be made to the best advantage of the Government, price and other factors considered, in accordance with the basic policies set forth in Subpart C of Part 400 and Part 590 of this title.

(b) *Conduct of negotiations.* Procurement by negotiation is less automatic than and does not have the rigid limitations of formal advertising, bid and award procedures; it allows to a greater extent than formal advertising the exercise of sound business judgment but in no way decreases the responsibility for properly protecting the interests of the Government.

(1) Contracting officers should conduct contract negotiations to the best advantage of the Government. They may bargain with any number of interested suppliers at any time prior to the award of a contract, as deemed desirable and practicable. After receipt of the initial proposals, separate negotiations may be conducted with any source of supply submitting an offer. The contract should be placed with the supplier making the best final proposal and who has the requisite ability to perform.

(2) Negotiation in accordance with the provisions of Sec. 592.101 will be accomplished to the end that maximum pricing benefits from all negotiated transactions may be realized. Benefits are obtainable through complete negotiation of transactions, particularly when one or several of the proposals indicate, or it is otherwise evident, that further negotiation may result in better pricing. During negotiations potential sup-

pliers must be informed of the provisions which will appear in the contract to be executed. (See also ASPR and APP 3-401) (See also Sec. 402.401 of this title and Sec. 592.401)

* * * * * * *

(c) *Request for proposals.*

(1) When a procurement of supplies or services is to be announced in writing to prospective contractors for the purpose of requesting quotations and other terms as a basis for conducting negotiations, a request for proposals, similar to WD Form 104 (Request for Proposal and Contractor's Proposal, Short Form) or WD Form 105 (Request for Proposal and Contractor's Proposal, Long Form) will be issued. (See Sec. 596.577 and 596.578 of this title.)

* * * * * * *

Study of Armed Services Procurement Regulations, Sections 1-605 and 2-302 and Navy Procurement Directive 3-002.1

REPORT

OF THE

SUBCOMMITTEE FOR SPECIAL INVESTIGATIONS

OF THE

COMMITTEE ON ARMED SERVICES

HOUSE OF REPRESENTATIVES

EIGHTY-FOURTH CONGRESS

SECOND SESSION

UNDER THE AUTHORITY OF

H. Res. 112

DECEMBER 5, 1956

Printed for the use of the Committee on Armed Services

United States
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Washington : 1956

STUDY OF ARMED SERVICES PROCUREMENT REGULATIONS

III. [3318] NAVY PROCUREMENT DIRECTIVE 3-002.1. PROPOSED DEPARTMENT OF DEFENSE REGULATION 3-705. AWARDS ON NEGOTIATED PROPOSALS WITHOUT FURTHER DISCUSSION WITH BIDDER

The subject is one as to which the subcommittee makes a finding and recommendation.

Navy Procurement Directive 3-002.1 is also the subject of a proposed Armed Services Procurement Regulation to be amended as section 3-705. The discussion and detail of this regulation follows:

[3319] · NAVY PROCUREMENT DIRECTIVE NO. 3-002.1
ARMED SERVICES PROCUREMENT REGULATION NO. 3-705
(PROPOSED)

The Navy Department has for some time had the following directive:

3-002 Conduct of Negotiations in Competitive Fixed-Price Procurement

3-002.1 The following policies and practices are established throughout the Navy for the conduct of negotiations which are to result in fixed-price types of contracts awarded on the basis of price competition.

a. *Where the negotiator is satisfied* from the proposals submitted *that there has been adequate competition and that the low price or prices are reasonable, award should be made without further negotiation* as to price to that responsible firm submitting the proposal which is most advantageous to the Government. *In such cases it is the policy of the Navy not to attempt to reduce the initial quotations by further negotiation.*

b. *Where the negotiator considers that the initial quotations are too high* or where there is inadequate pricing knowledge to justify an award on the basis of the initial quotations, *further negotiations shall be conducted in accordance with the following policies:*

(1) Where a responsible firm submits a quotation which is substantially lower than those submitted in all other proposals, negotiations may be conducted only with that firm.

(2) Where several firms submit quotations which are so grouped that a moderate reduction in price might make any one of the group low, negotiations will normally be confined to firms within such grouping. Whenever negotiations are conducted with more than

one firm there shall be a strict avoidance of "auction" techniques. *No information regarding the number or identity of the firms participating in the negotiations shall be made available to anyone whose official duties do not require such knowledge.* Furthermore, no indication shall be made to any firm of a price which must be met to obtain further consideration. To this end, whenever negotiations are being conducted with several firms, while such negotiations may be conducted successively, all firms participating in such negotiations shall be offered the opportunity to submit such revisions in their quotations as may result from the negotiations up to a time designated by the negotiator. The designated time shall be the same for all firms involved in the negotiation and shall provide adequate opportunity for all such firms to submit revised proposals.

(3) *All firms shall be informed that after the submissions of such final prices, no further unsolicited revised*
[3320] *quotations will be considered and no information will be furnished to any of the firms which submitted quotations until award has been made.*

[Italic supplied.]

On July 19, 1956, while the subcommittee had these subjects under consideration after adjournment from prior hearing of June 14, 1956, Brig. Gen. William K. Ghormley, in testifying before the subcommittee, stated that "the Department of Defense has tentatively approved for Defensewide use guidelines for the conduct of negotiation" which would adopt Navy procedure quoted above.

General Ghormley then submitted to the subcommittee the proposal which, he testified, had been tentatively adopted to amend Armed Services Procurement Regulation 3-705 in the following particulars and manner:

CASE 54-79—PROPOSED REVISION TO ASPR-3-705

3.705 Selection of Contractors for Negotiation and Award

(a) Where the contracting officer is satisfied, from the proposals submitted, that there has been adequate competition and that the low price or prices are reasonable, award may be made without further negotiation as to price to that responsible firm submitting the proposal which is most advantageous to the Government. In such cases, it is the policy of the Department of Defense not to attempt to reduce the initial price quotations by further negotiation.

(b) Where the contracting officer considers that the initial quotations are too high or where there is inadequate pricing knowledge to justify an award on the basis of the initial quotations, further negotiations shall be conducted in accordance with the following policies:

(i) Where a responsible firm submits a quotation which is substantially lower than those submitted in all other proposals, negotiations may be conducted only with that firm.

(ii) Where several responsible firms submit quotations which are so grouped that a moderate reduction in price might make any one of the group low, negotiations will normally be confined to firms within such groupings.

Whenever negotiations are conducted with more than one firm there shall be a strict avoidance of "auction" techniques. No information regarding the number or identity of the firms participating in the negotiations shall be made available to the public or to anyone whose official duties do not require such knowledge.

Furthermore, no indication shall be made to any firm of a price which must be met to obtain further consideration. Whenever, in the course of negotiation, a substantial change is made in the Government's re-

quirements, for example, increases or decreases in quantities or material changes in the delivery schedules, all firms involved in the negotiation will be given further opportunity to submit revised proposals under the revised requirements. To this end, whenever negotiations are being conducted with several firms, while such [3321] negotiations may be conducted successively, all firms participating in such negotiations shall be offered an equitable opportunity to submit such revisions in their quotations as may result from the negotiations.

All firms shall be informed that after the submission of such final prices, no information will be furnished to any of the firms which submitted quotations until award has been made.

(c) Deviation from the above general policy is authorized in appropriate cases when buying research and development, special services (such as architect-engineer services) or when cost reimbursement type contracting is anticipated. The decision that a price is fair and reasonable may be properly influenced by the technical proposal promising the greatest value to the Government in terms of possible performance, ultimate productibility, growth potential, and other factors bearing upon "state-of-the-art" considerations rather than the proposal presenting the lowest estimate of price or probable cost and fixed fee.

The nature of the procurement, ability of a contractor to perform, or the reasons for use of a cost reimbursement type contract may be the controlling factors in making the selection.

It will be observed that subparagraph (a) is identical with the Navy directive cited. Subparagraph (b), (i) and (ii) are identical with the Navy directive cited. Paragraph (c) in the Department of Defense proposed directive, above

cited, is not included in the same manner in the Navy directive.

Our consideration of these two directives relate to subparagraphs (a) and (b) of both the Navy directive and the tentatively approved Department of Defense proposed directive.

The subcommittee in 1955 received a protest concerning the use of the procedures outlined in the Navy directive, supra, and conducted correspondence with the Comptroller General concerning a protest lodged with that office.

In the subject matter under protest to the Comptroller General, the invitation for proposals issued by the Armed Services Petroleum Purchasing Agency under RFP 56-N-14 in paragraph 13 contained the following information:

> The proposal shall serve as a preliminary basis for negotiation of a definitive Service Contract and a separate Facilities Contract with that Offeror(s) whose proposal is considered to be in the best overall interest of the Government. Your proposal should be submitted by filling in the blank spaces in the attached Schedule. However, alternate proposals of any type, that can be evaluated on a common basis with other proposals will be considered only if in the best interest of the Government so to do.

Subsequent to that text, the Navy Department issued a revised invitation which contained the following language:

> Each Offeror is cautioned to submit in response to this Request for Proposals its best offer since, after the date estab- [3322] lished herein for the receipt of proposals, THERE MAY NOT BE an opportunity accorded the Offeror to revise its proposal.

The Comptroller General's case number relating to this subject matter is B-125770, and appears in the exchange

of the Comptroller with the Department of the Navy in the hearing.

The Comptroller General in a letter dated January 5, 1956, requested to be advised by the Secretary of Defense—

> * * * whether it is the view of your Department that the negotiation procedures prescribed by the (this) Navy directive above-quoted are sufficient to secure for the Government "the best possible agreement," as apparently contemplated by the Congress, and the "full and free competition" provided for by the applicable provision of the Armed Services Procurement Regulation.

Under date of February 16, 1956 (see hearing), the Assistant Secretary of Defense for Supplies and Logistics replied:

> Our experience has established the belief that, whatever may be the particular problem, we must find a way to cause the potential contractor to provide his best quotation. We believe that this can best be accomplished if he is not assured that there will be further individual bargaining. If so assured, he will, without question, present his quotation in such a way as to include a contingency allowance for negotiation purposes. In the latter instance, we can never be certain that the bargaining will result in removing such allowances. It must be pointed out that if the contracting officer believes that the lowest quotation which he has received is not reasonable, the Government has kept open its option to "bargain" to obtain reasonable pricing.

The Department of Defense thereupon advised that it was in the process of development of price negotiation policies and practices and that the procedure embodied in the Navy directive had been considered and "it was deter-

mined tentatively to adopt this procedure for DOD-wide use."

This subject came before the full committee at a hearing on January 15, 1956 (Print 42, Full Committee Proceedings, p. 5197 et seq.), concerning the use of the emergency exceptions permitted under section 2 (c) (1) of the Armed Services Procurement Act of 1947 (now title 10, U. S. Code Annotated, sec. 2304 (a) (1), act of August 10, 1956). At that time, the chairman of the full committee stated that this regulation was "too restrictive along that line" (p. 5208). He pointed out that the Assistant Secretary of the Army (Higgins), testifying as the principal witness for all three services, had asserted that there was as much competition in negotiation as in competitive (advertised) bidding. The chairman commented: "But that doesn't exist in view of these Navy regulations. And that is the only criticism that I have to make about the Navy viewpoint." There was no dissent expressed by the committee to the statement of the chairman on these observations.

The defense of this type of regulation is that under the Armed Services Procurement Act everything that is not "formal advertising" [3323] becomes something else which, for lack of a better term, is called "procurement by negotiation."

In discussing the matter before the subcommittee, a Navy representative stated:

> There is no connotation in this whole procedure which would allow us to conclude that it is an extension of our authority to negotiate. The authority to negotiate must be there and authorized by Public Law 413 before we can enter into this procedure.

Summarized

The Navy Department and, in turn, the Department of Defense defend the procedure outlined in these regulations

upon the theory that it is their duty to require, and the bidder's duty to propose initially, a price proposal which, in the sole judgment of the contracting officer, is the best price proposal which he will offer for services or supplies. All this is to be on the first submission to avoid "auction" techniques. Bidders who do not respond with final figures on an initial request for a proposal to negotiate, for having failed to give their ultimate and final figures on their first submission are to be punished by being excluded. The contracting officer is set up as the final judge and sole arbitrator of compliance with this norm of conduct and may award to that person submitting an initial proposal which in his opinion represents the lowest price that any bidder will submit.

During the course of the hearings, the question was asked whether this procedure was designed to procure supplies and services by negotiation "in the best interests of the Government" and at the lowest possible price, or whether in fact it was not a weapon to punish the reluctance of bidders responding to invitations who, in the opinion of the contracting officer alone, did not submit full and final figures, but were waiting for further discussions.

Since the hearings, above referred to, Congress has passed a codification of laws relating to the Armed Forces. Title 10, United States Code, the act of Congress approved August 10, 1956, incorporates in a codification the Armed Services Procurement Act of 1947 (Public Law 413, 80th Cong.) as chapter 137, sections 2301 to 2304.

Section 2 (c) of that act provided that—.

> All purchases and contracts for supplies and services shall be made by advertising, as provided in section 3, except that such purchases and contracts may be negotiated by the agency head without advertising if * * *.

Then followed a list of 17 exceptions.

Title 10, United States Code, section 2304, the codification of the statutes has the following language (as a substitute for the language above cited from sec. 2(c)):

> (a) Purchases of and contracts for property or services covered by this chapter shall be made by formal advertising. However, the head of an agency may negotiate such a purchase or contract, if—

There follows, in the codification, an exact repetition of the 17 exceptions contained in the original act.

[3324] The reviser's report (S. Rept. 2484, 83d Cong., 2d sess.) makes no reference to the fact that the word "all," preceding the word "purchases," was dropped in the codification.

The revisers' notes merely say that section 2304 (a) is derived from title 41, section 151 (c) (less proviso of clause 1 and proviso of clause 16). There is no further explanation.

The Armed Services Procurement Act of 1947 (act of February 19, 1948, 6 Stat. 21) did not define the word "negotiate" as used in that act.

However, the reviser, in the codification which now is title 10 of the United States Code, has added an additional section 2302, headed "definitions," which reads:

> In this Chapter—"Negotiate" means make without formal advertising.

That definition is not in the basic law.

There has also been an additional definition added:

> (3) "Formal advertising" means advertising as prescribed by section 2304 (a) and (b) of this title.

Section 2305 of title 10 is a repetition of section 3 of the Armed Services Procurement Act with only inconsequential changes in language.

Senate Report 2484, 84th Congress, 2d session, on page 144, gives the revisers' explanation of section 2302 as having been derived from United States Code, title 41, section 158 (less clause b) or 62 Statutes 24 less clause b.

The revisers' explanation of clauses 2 and 3 above cited is as follows:

> Clauses (2) and (3) are inserted for clarity and are based on the usage of those terms throughout the revised chapter.

Department of Defense views seem to have leaked through to the codifiers.

The Armed Services Procurement Act of 1947 does not define what the word "negotiation" nor what the word "negotiate" means, as used in that act. A definition has now been supplied by the code.

Our question then concerns the application of the definition supplied in the codification of the basic law to the procedures we have under discussion and to usage of the word "negotiate" as a matter of statutory construction as defined in the basic law.

In the testimony before the full committee on January 10 through 13, 1956, the Assistant Secretary of the Army observed that, as used by the Department of Army, "negotiation is any method of procurement other than 'formal advertising.'"

However, section 3-101 of Armed Services Procurement Regulations defines the word "negotiation" as used in those regulations as—

> that method of procurement under which the procedures for procurement by formal advertising as set forth in section II are not required.

That statement in the Armed Services Procurement Regulations follows the language of the law.

But, apparently, the Department of Defense and its subordinate departments have come to the conclusion that what

is not "formal- [3325] advertised competitive bidding" is perforce "negotiation" as intended by the Congress.

This construction seems to be prevalent in the executive branches. A representative of the Navy Department testified that—

> everything that is not formal advertising then becomes something less and that something less we call, for lack of a better term, "procurement by negotiation."

The subcommittee finds itself at this point inquiring as to what the word "negotiate" means and what the procedure "negotiation" means as defined in the basic law.

On the face of it, it is quite apparent that the word "negotiation" as used in the common acceptance of the term and even as understood by representatives of the Navy is a definition different from the one proposed in the regulations and that contained in the codification.

A definition of "negotiation" contained in the standard dictionary contradicts both the Navy directive and Assistant Secretary Higgins' conclusions, above cited. A Navy witness cited the standard dictionary. He found, as anyone can, that the word "negotiation" as defined in the standard dictionary is "to hold intercourse with a view to coming to terms, to confer regarding a basis of agreement, as to negotiation for the purchase of a home." And he found in the same source that "negotiation" means "a parley or conference regarding terms." If the dictionary is to be followed, there must be a parley or conference regarding terms; otherwise, there is not a negotiation.

If, therefor proposals are accepted without discussion (even with one proposer) there is, in simple terms, no "parley or discussion."

The word "negotiation" derives from the Latin and in the civil law means "trading or deliberations leading to an agreement."

The Pennsylvania Supreme Court[1] says that negotiations are what pass between parties incident to the making of a contract and that—

> unless discussion could be brought to a point whereby the interest of the proposed buyer can be aroused or the terms of a sale discussed, it cannot be classified as negotiation.

The Florida Supreme Court,[2] in construing a statute which authorizes trustees to negotiate for the lease of mineral rights, said that the word meant to "discuss or arrange a business transaction." To the same effect are other cases.[3]

It thus becomes apparent that the essence of negotiation both in common use, in statutory construction and definitions by the courts is "discussion, conversations, parleys." Nowhere is it suggested by the courts that if "discussions or parleys" are eliminated, the transaction constitutes "negotiation."

There is, therefore, an abundance and unanimity in construction of the word "negotiate" both in the courts and in common use.

Thus, in the subcommittee's view, there is a serious legal question as to whether or not the procurement method prescribed by this Navy [3326] directive is in fact a "negotiation" as defined in the statute. Until such time as there is a definitive ruling, it seems to the subcommittee that the Department is proceeding upon very tenuous grounds.

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[1] *Werner* v. *Henricks*, 182 Atl. 748, 9 (Penn.).

[2] *Watson* v. *Halloran*, 20 So. 2d 388 (Fla.).

[3] *King* v. *Silvers*, 37 NE 413, 416 (Ind.); *Northrup* v. *Diggs*, 106 SW 1123 (Mo. App.); *Intermountain Title Co.* v. *Egbert*, 16 Pac. 2d 390 (Idaho); *Modern Furniture Co.* v. *Dubuque Fire and Marine Insurance Co.*, 191 NE 637, 638 (Mass.); *Aurora State Bank* v. *Hayes-Eames Elevator Co.*, 129 NW 279 (Neb.); *Newport National Bank* v. *Board of Education*, 70 SW 186, 24 (Ky.); *People* v. *Augustine*, 204 NW 747 (Mich.).

The problem is compounded when we go back to the only expression upon what constituted "negotiation" as considered by the Congress at the time the Armed Services Procurement Act was passed.

For that purpose we refer to House Report 109, 80th Congress, 1st session, wherein Congress adopted the representations of the departments as to what they did when conducting "negotiations," and, we think, obviously approved practice described as being "negotiation" as it would be conducted when the act passed. It follows:

> Procurement by negotiation as practiced by the services and industry consists of first securing informal quotations from as many sources as practicable, usually accompanied by breakdowns of elements of cost. Separate negotiations then usually begin with the lower bidders, in order to reduce the price by eliminating unnecessary or unjustified charges. When the best possible agreement has been reached, an appropriate contract is awarded the successful firm. Experience has shown that by careful negotiation and by drafting a suitable contract it is frequently possible to secure substantial savings for the Government. Negotiation, properly employed, can promote and intensify competition.

Congress stated that the Armed Services Procurement Act in its view "narrowed the circumstances in which contracts may be negotiated * * *"

We find a very substantial flaw in the Navy Department's existing directive and the DOD proposal.

We do not think that title 10 of the code has expressed the intent of Congress by such a definition of "negotiation."

A witness for the Navy Department in defending its procedure and proposal very properly observed, as this subcommittee does, that the "negotiation" in the act must be under 1 of the 17 exceptions prescribed.

If we consider the procedures authorized in these 17 exceptions as "negotiation," for want of a better descrip-

tion; then we are not puzzled by the adoption of the word "negotiation" as meaning everything else but formal advertising.

To accept the departmental position, we must agree that the procedures outlined in the 17 exceptions is "negotiation" in each instance. Now we are required to go further and agree that "negotiation" is everything other than formal advertising.

When the act is suspended, the method of procurement is not prescribed. What has been excluded is the strict formal advertising for competitive bids. But that does not amount to a statutory definition or the explanation of what "negotiation" shall consist of when any 1 of the 17 exceptions is used.

We must look to other sources for help:

(1) What evidence was there before the Congress at the time it adopted and used the word "negotiation" in its statute? That, we have pointed out. It is at complete variance and negates not only the principle but the language contained in these directives; and

[3327] (2) If there were no definition, then we must adopt—

(a) Statutory construction of the word "negotiation"; or

(b) Use of the word "negotiation" in the common acceptance of the term without regard to restricted legal usages.

After all, as the Supreme Court of the United States said, in the case so frequently cited by the Comptroller General (*U. S.* v. *Purcell Envelope Company*, 249 U.S.C. 313):

"* * * it is not out of place to say that the Government should be animated by a justice as anxious to consider the rights of the bidders as to insist upon its own."

Certainly the opportunity of competing for public business as that Court has said ought not to be fitted out with new conceptions in the use of a common word. The Government is procuring supplies from a variety of bidders; not from the United States courts.

SUMMARY

The issue presented by the Navy procurement directive and the proposed Defense Department directive is what constitutes "negotiation" within the meaning of the statute.

What this procedure amounts to is this: It is an assertion by the Department that "negotiation" as defined in the statute means merely and is limited to a request for proposals without the Government being under any obligation to discuss their proposals with a bidder or bidders.

We have pointed out that in the common usage of the term, in the statutory construction of the same, and in the subcommittee's understanding of the practice of the Department as represented to it prior to the passage of the Armed Services Procurement Act, "negotiation" meant a discussion or a parley—something more than merely extending a written invitation to submit proposals and accepting one of those proposals.

A further query then is, In the absence of any discussions (even through the bid documents may warn the bidder that discussions may not ensue), has the Government exonerated itself of its responsibility and is it acting within the scope of the powers conferred by the Congress? That is a serious question.

We would understand that these prospective bidders were expected to negotiate as the invitations state; and that the very need of inviting proposals instead of sealed competitive bids is based on an administrative finding that negotiation is needed to iron out any difficulties, differences, or prices during the discussion procedures.

Where a bidder is invited to submit a proposal for negotiation, can it be said that this bid is fully responsive when either the bidder or the bid documents suggest that his proposal may be treated as a straight offer which may be accepted without change and constitutes a contract? We think that such is not the intent of the Congress. The Comptroller General's opinion does not support such a construction. (See 35 C.G. Opinions 167.)

Further, how can such a proposal constitute a firm offer on the part of the bidder which may be accepted by the Government? It is at best only an alternative and other bidders do not have the same alternative; i.e., making a firm offer. Can a proposal to discuss the subject in [3328] negotiation constitute a contract without further action by both parties? See 31 C.G. 383; Williston on Contracts, section 27; Corbin Contract, section 24; *Buckberg* v. *Washburn Crosby Company* (93 SW 733). In *Heyer* v. *U. S.* (140 Fed. Sup. 409), the court observed that a bidder had a right to have his bid honestly and fully considered.

The subcommittee is not convinced that this procedure is authorized by statute or that it constitutes negotiation as permitted by Congress. But if the argument of the departments is correct and if this is an authorized procedure, then the very method employed—i. e., acceptance of a proposal without discussion even with the low bidder—constitutes an evaluation of all bids, a determination of the lowest bid, the determination of the responsive and responsible bidder, and a finding that no discussions are required in order to form a contract between the parties with respect to any of the details of the proposal.

If all of these elements are present (and they must be in order to make such an award under the Navy procurement directive) then there is no reason in the world why that bidding could not have been accomplished by formal advertised competitive bid as prescribed in the statute.

We think this directive is not only unlawful but that it is an evasion of the statute. We think the procedure is unauthorized. We think it is unfair both to the Government and to prospective bidders. More than that, we think it is arbitrary and a potential source of mischief and abuse. It is not necessary to the procurement process.

Congress permits discussions by way of negotiation between purchaser and seller in certain cases in order to form a contract in the best interests of the Government and at the price most favorable to it.

Congress has said that every other procurement must be in the traditional American system of free, open, advertised, competitive sealed bidding.

If discussions are not necessary in order to enter into a firm contract between seller and purchaser, then it is an admission that all the details are present in the invitation and the proposal to form a contract. If that be the admission, then invitation and bid are firm from the beginning; and there is no reason why that type of purchase cannot be accomplished at open, advertised, competitive bidding.

A denial for the need of discussion is an admission that the Government is able to purchase without discussion.

Conclusions and Recommendations

III. [3329] The subcommittee is wholly in disagreement with the provisions of Navy Procurement Regulations 3-002.1 and the proposal of the Department of Defense to make the same "Department of Defense-wide" by a proposed amended section 3-705 of the ASPR's.

We feel that this regulation is wholly unauthorized. It defeats, in our opinion, the congressional purpose in permitting negotiations in certain cases; and it is, we believe, a potential source of abuse of administrative discretion. It

could be a source of great mischief within the departments administering the same.

The departments have long argued for greater flexibility in the forming of contracts and have been given latitude for discussions in bargaining. Yet this regulation is just the opposite of bargaining. It removes all of the flexibility which is sought because it denies the opportunity for discussion. It deceives bidders no matter how artfully phrased.

This regulation introduces an inflexibility which is the direct opposite of negotiation in the common usage of that term, in the statutory construction thereof and in the understanding of congressional intent as to the negotiations practiced by the departments and allowed by law in 17 specific instances.

Every argument for the use of this regulation is an argument against its necessity. If proposals can be evaluated and contracts let on proposal without any discussions or parleys, then there is nothing in the invitation which requires elaboration or discussion. In such circumstances, there is no reason why the contract cannot be let on advertised open competitive bidding as provided in the statute as the traditional American way of public contracting.

Unless this regulation is promptly withdrawn, we would recommend that the Congress legislate to put this regulation and the practices under it, however few in number, out of existence.

Dated: December 17, 1956.

Respectfully submitted, with unanimous approval of the subcommittee, and ordered published.

F. Edward Hébert,
Chairman, Subcommittee for Special Investigations.

Approved: December 17, 1956.

Carl Vinson,
Chairman, Committee on Armed Services.

[R. 23a] **Opinion of the Comptroller General of the United States**

Washington 25, Feb. 12, 1952.

The Honorable the SECRETARY OF THE ARMY.

MY DEAR MR. SECRETARY: Reference is made to your letter of January 11, 1952, with enclosures, requesting a decision as to whether an enforceable contract exists between the Government and John McShain, Inc., for certain construction work at Camp Ritchie, Maryland, covered by invitation No. ENG-49-080-52-13-(15), dated September 14, 1951.

The record shows that, at a conference held in the office of the District Engineer, Washington, D. C., on September 6, 1951, for the purpose of acquainting prospective bidders with the general nature of the work to be performed, the contractors present, including representatives of John McShain, Inc., were advised in part as follows:

> "The proposals will be opened in this room at 1500 hours on the 2nd of October, 1951. Negotiations will be conducted with those submitting the three lowest proposals to determine the final conditions and price."

The referred-to invitation was issued under date of September 14, 1951, and stated that proposals, which would be the basis of negotiating a construction contract, would be received until October 2, 1951. Of the proposals received, that of John McShain, Inc., was low at $6,574,825, the other proposals ranging from $7,944,010 to $11,509,980. The proposal did not contain any qualification and stated that the contractor would execute a contract within 30 days after date of opening and would commence work within 10 days after receipt of notice to proceed. It is stated in first indorsement of December 3, 1951, from the Division Engineer to the Chief of Engineers, that the Division Engineer, immediately after the results of the bidding were reported

to him, instructed the District Engineer to determine whether an error had been made by John McShain, Inc., in view of the relatively low bid submitted, but that when the District Engineer replied that the contractor was pressing for an award of the contract, authority to make such award was granted.

[R. 24a] In your letter of January 25, 1952, with reference to the matter, you state that, after the proposals were opened, the second and third lowest bidders indicated that, in view of the low proposal submitted by McShain, they were not interested in further negotiations as they could not approach the price; that the Corps of Engineers was cognizant that McShain was "able to pare certain administrative expenses because of the fact that a previous contract (No. DA-49-080-eng-833) was still in force"; and that on October 12, 1951, representatives of the contractor attended a conference—which is shown to have been held in the office of the District Engineer, Washington, D. C. "—for the purpose of discussing the proposal and settling any contract questions."

The record shows that three representatives of John McShain, Inc., none of whom were officers of the corporation, attended the conference of October 12, and that these representatives asked various questions relating to the performance of the work and gave no indications that John McShain, Inc., would not be willing to take the contract at the amount stated in its proposal. Mr. Paul Hauck, the contractor's general manager, who was present, did express some concern because the amount quoted did not include anything to cover contingencies, overtime, liquidated damages, or price and wage increases. On the same day, but subsequent to the conference, a formal notice was issued by the District Engineer to the contractor stating that its proposal, in the amount of $6,574,825, was thereby accepted, that a formal contract was being prepared, and that the contractor was to proceed with the work. The

contractor was requested in the notice to acknowledge receipt thereof in the space provided for the contractor's signature and to return the original and one copy to the office of the District Engineer at once, retaining a copy.

The record contains a memorandum made by the District Engineer of a conference held in his office with John McShain and Paul Hauck on October 24, 1951, which states that Mr. McShain stated at such time that he was willing to go ahead with the job, but that two of the trades, plumbers and steamfitters, had refused to man the job at the wage rates set forth by the Department of Labor, and the Baltimore unions were [R. 25a] requesting that the Ritchie project be placed within their district and were requesting an increase in wage rates, and that he thought it was the responsibility of the District Engineer to have the Department of Labor issue new wage rates in line with the Baltimore rates, or place the Ritchie project under jurisdiction of Hagerstown unions, which would mean lower rates. The memorandum states that Colonel McCutchen stated that the contractor would have to have the International Union state its refusal, in writing, to man the job at the rates published by the Department of Labor, in which case the matter would be submitted to the Chief of Engineers and be forwarded to the Department of Labor. In an affidavit filed with this Office by John McShain on January 28, 1952, it is stated that the affiant informed the District Engineer at this meeting that a serious mistake had been made in the computation of the bid, but that, by reason of the fact that the contractor had contract No. DA-49-080-eng-833 to perform, the contractor could probably "get by" with the contract involved. However, affiant further states that he advised the District Engineer that certain items would have to be adjusted and cleared up before any contract could be signed, or agreement reached, particularly the wage scale situation.

By letter of October 26, 1951, John McShain, as President of John McShain, Inc., advised the District Engineer that

the contractor had purposely delayed returning the notice to proceed in view of the serious problem of the wage scale which, it was believed, should be settled before any attempt was made to proceed with the work. Also, on November 7, 1951, the contractor, having received notice on November 5 of the termination for the convenience of the Government of what appears to have been the major portion of contract No. DA-49-080-eng-833, wrote the District Engineer that the cancellation of said contract had seriously affected its position on the contract here involved and requested a conference on November 14. At the conference, according to the memorandum in the record, John McShain stated that he had "bid" for the work here involved solely because of having been awarded contract No. DA-49-080-eng-833; that he had been prepared to absorb the loss due to his mistake by reason of having the first contract, and that he did not feel that he could possibly undertake [R. 26a] the work under the circumstances. Accordingly, he asked to be excused, stating that the contracting officer should have recognized that the bid was extremely low in comparison with the others and notified him of a possible mistake at the time.

The contractor contends before this Office that the mistakes in the calculation of its bid which were set forth in its letter of December 31, 1951, to you, were made because of the necessary haste in preparing its bid. In this connection, the contractor calls attention to the fact that the specifications for the work involved contain approximately 575 pages and, in addition, four addenda, of which two are dated September 20, 1951, and the others September 25 and September 26, 1951, and that extensive drawings formed a part of the requirements for a bid. In the affidavit referred to above, John McShain states that, on October 2, 1951, in reviewing the estimates which the contractor had received for the subcontracts and the information covering the work to be done by the contractor, some doubt arose in his mind as to the advisability of attempting

to submit a bid covering the work. However, he states that, in view of the statement which had been made to prospective bidders at the conference of September 6, 1951, to the effect that negotiation would be conducted with those submitting the three lowest proposals to determine the final conditions and price, he decided to submit a figure based upon the estimates that were available in the belief that any discrepancies arising could be taken care of before the contract was finally negotiated. The contractor contends that the notice of award was issued before any negotiations were held with representatives of the contractor who would be authorized to consummate a contract, and that, since the award of the contract never was finally accepted, no contract can be said to have been consummated.

The contractor's bid was considerably lower than the other bids and you have stated, as indicated above, that the Corps of Engineers was aware that the contractor would be able to pare certain administrative expenses by reason of having another contract to perform at the site of the work. Also, the contracting officer was advised from the statement made by Mr. Hauck at the meeting of October 12, referred to above, that the contractor's bid included nothing for contingencies. [R. 27a] Under these circumstances, the Department of the Army would have been under a duty to advise the contractor that the termination of contract No. DA-39-080-eng-833 was being considered before accepting its bid in the event it had any information to that effect. While you state in your letter of January 25, 1952, that the contracting officer had no knowledge that said contract would be terminated, it is not shown that other officials of the Department of the Army were unaware of such fact.

However, aside from the above question, there is the more fundamental one of whether a contract was ever consummated. The fact that prospective bidders were

advised at the pre-bid conference that negotiations would be conducted with those submitting the three lowest proposals to determine the final conditions and price and that the invitation stated that proposals would be received for the purpose of "negotiating" a construction contract would be calculated to lead bidders to believe that the contract was to be negotiated informally, rather than on a formal bid and acceptance basis. It is not denied in your letter of January 25 that negotiation with the bidders following receipt of the proposals was contemplated at the time the invitation was issued, but you state that the meeting of October 12 was considered to cover all the points subject to negotiation, since the price quoted apparently was acceptable to the contractor at that time.

Admittedly, the representatives of the contractor who were present at the meeting of October 12 should have stated at that time that the amount bid was not considered by the contractor to be firm. However, if as appears to be the case it is admitted that the contractor was entitled to negotiate the contract informally and that the proposal submitted was not, therefore, understood to be a firm proposal, then it necessarily follows that any negotiation had would not be binding on the contractor unless transacted with representatives of the contractor who were duly authorized to enter into a final and binding agreement. In this connection, there has been submitted here a "Certificate of Certification of Secretary of John McShain, Inc., of Delaware," wherein it is stated that the President and, in his absence or disability, the Vice-President, [R. 28a] are authorized by sections 31 and 33 of the by-laws of the corporation to execute bonds and other contracts requiring the seal, under the seal of the corporation, and that the only other persons authorized to perform such functions for the corporation are Vincent P. McDevitt, the corporation's counsel, and Edward S. Barnhart, Secretary of the corporation, who, jointly and severally, were appointed

attorneys-in-fact for the corporation at a special meeting of the Board of Directors held on July 5, 1949, and that their authority to perform such functions is operative only when the President and Vice-President of the corporation are absent from the country. Relative to the authority of Messrs. Hauck, Tippett and Russell, the representatives of the contractor who were present at the meeting of October 12, 1951, it is stated in the McShain affidavit as follows:

> All bids submitted by the Corporation must be approved by me before submission and Messrs. Hauck, Tippett and Russell have never been authorized to submit, nor have they ever submitted, a bid on behalf of the Corporation without securing such approval.
>
> Messrs. Hauck, Tippett and Russell have never been authorized to negotiate or accept, nor have they ever negotiated or accepted, a contract on behalf of the Corporation. On occasion they have communicated to contracting officers the fact that I have approved particular contracts, having obtained my approval before the meeting or during the course of the meeting by telephone.

Of course, the representatives referred to, who were not officers of the corporation, would have no implied authority to bind the corporation in a matter of this kind for the reason that negotiation of the contract necessarily included the execution of the contract and the payment and performance bonds, which were required to be signed by an officer of the corporation. Hence, it would seem that the proceedings which took place at the meeting of October 12 did not amount to a negotiation of a final contract, or have the effect of converting the contractor's proposal to a firm bid the purported acceptance of which created a contract. On the contrary, there is substantial basis for

the view that the notice of award and notice to proceed [R. 29a] which was issued to the contractor on October 12, 1951, constituted no more than a firm offer on the part of the Government to award the contract to the contractor at the price stated in its proposal and, as such, would have had to have been accepted without qualification by the contractor in order for a contract to be consummated. As indicated above, the contractor never returned the referred-to notice with its signature, as contemplated, and there is considerable doubt that a court would hold that the statement reported by the District Engineer to have been made by John McShain at the meeting of October 24, 1951, to the effect that he was willing to go ahead with the work, constituted an acceptance of the offer of award, particularly in view of the fact that McShain reportedly followed such statement immediately with the statement that he thought it was the responsibility of the District Engineer to take action to the end that certain wage-rate problems could be resolved, and of the contention made in McShain's affidavit, referred to above, as to the conditional nature of the offer. Moreover, the contractor's letter of October 26, 1951, the contents of which are set out above, is capable of being interpreted as a conditional acceptance only. The negotiations were in this status when, on November 14, 1951, the contractor advised the District Engineer that it would be unable to undertake the work in view of the termination of contract No. DA-49-080-eng-833. Hence, under the facts developed from the evidence presented here, and considering the ambiguities, uncertainties, and confusion which attended the entire transaction, there appears no clearly sound basis for concluding that a contract was ever consummated, or that John McShain, Inc., has incurred any liability under its bid.

The copy of contract No. DA-49-080-eng-856, the specifications thereto and abstract of bids, as well as copy of contract no. DA-49-080-eng-833, are returned herewith. The

other papers transmitted with your letter are being retained in this Office.

Sincerely yours,

(S) LINDSEY C. WARREN,
Comptroller General,
of the United States.

Enclosures.

In the Federal Bar Journal Vol XIV October-December 1954, No. 4 appears an article entitled "The General Accounting Office in Government Procurement" by the Assistant General Counsel of the General Accounting Office, J. Edward Welch.

On page 322:

"As a protection against adverse action (exceptions) in the post audit, disbursing officers, certain certifying officers in the Executive Branch, and the heads of all Government agencies may apply to the Comptroller General for a decision on any question involving a payment to be made by them. 31 U.S.C. 74 and 82d. Also, in order to minimize delay in making award of Government contracts, contracting officers may, if contracting agency procedure permits, submit directly to the Comptroller General for advance decision questions involving mistakes in bids. 16 Comp. Gen. 565.

"Thousands of such requests for decision are received and passed upon annually by the Comptroller General. Thousands of claims by and against the Government are also submitted to and handled by the Office each year."

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